Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 94-148

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| In re | ) | |
| Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service | ) | MM Docket No. 93-24 |

# ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

**Adopted: June 9, 1994** **Released: July 6, 1994**

**Comments Due: August 29, 1994**
**Reply Comments Due: September 28, 1994**
**By the Commission:**

1. By this Order and Further Notice of Proposed Rulemaking, the Commission continues to consider amending its rules to alter the procedures governing the acceptance of applications for new Instructional Television Fixed Service (ITFS) stations, major amendments to such applications, or major changes in existing stations. We also seek comment on several additional proposals put forth by the commenters and on our own motion intended to increase the efficiency and curtail potential abuse of our application processes.[1] Finally, we modify the freeze on the filing of major change applications that we adopted earlier in this proceeding to permit the filing of major change applications and any competing applications thereto.

## INTRODUCTION

2. Our goal in this proceeding is to enhance the efficiency of our processing of ITFS applications. Since 1985, applicants for new ITFS stations or major changes in existing

[1] We will revise FCC Application Form 320, which is used by applicants seeking a construction permit and license for new ITFS facilities or for major changes in existing facilities, as necessary to implement whatever changes are adopted.

stations have been subject to an A/B cut-off procedure.[2] We questioned in the Notice of Proposed Rulemaking in this proceeding whether this procedure is appropriate for the rapidly evolving ITFS service.[3] We stated that the telecommunications environment has changed substantially since 1985, when the Commission instituted the cut-off procedure.[4] We further observed that the overwhelming majority of tendered applications now include excess capacity lease agreements with wireless cable operators.[5] The Notice asserted that these changes have fostered a substantial increase in the rate of applications filed for new ITFS stations or major changes in existing stations, creating a significant backlog of applications. We therefore proposed a window filing procedure to allow us better to control the flow of applications, thereby improving processing efficiency.

3. Based on the present record, we believe that adoption of the window filing system for the ITFS service would likely promote application processing efficiency. We are also persuaded, however, that before adopting a window approach, the Commission should consider both the need for and the means of curbing potential abuses of the window process.

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[2] This procedure involves placing the first application(s) accepted for filing and determined to be substantially complete on a public notice called an "A cut-off list." This list notifies the public that the application has been accepted and gives interested parties 60 days to file competing applications or petitions to deny. An applicant placed on the "A" cut-off list is required to make any major changes to its proposal before the end of the "A" cut-off period. After the "A" period expires, the staff places all substantially complete applications which were filed during that period and found to be mutually exclusive with any listed "A" application on a "B" list. This list notifies the public that the specified applications have been accepted for filing, and it provides 30 days for the filing of petitions to deny or minor amendments.

[3] Notice of Proposed Rulemaking in MM Docket No. 93-24, 8 FCC Rcd 1275 (1993) (Notice).

[4] Id. at 1275, citing Second Report and Order in MM Docket No. 83-523, 101 FCC 2d 49 (1985). Specifically, we noted that we have modified the minimum programming requirements for new ITFS operators; Report and Order in Gen. Docket Nos. 90-54 and 80-113 (Wireless Cable Order) 5 FCC Rcd 6410, 6416 (1990); authorized 15-mile interference protection for ITFS licensees which lease excess capacity for wireless cable operations; Order on Reconsideration in Gen. Docket Nos. 90-54 and 80-113 (Wireless Cable Reconsideration) 6 FCC Rcd 6764, 6766-67 (1991); authorized the use in some situations of channel mapping technology by ITFS licensees and wireless cable lessees; Id. at 6774; and modified our "ready recapture" requirement with regard to excess channel capacity leasing by eliminating unduly restrictive time-of-day and day-of-week regulations. Id. We do not intend to suggest by our use of the term "wireless cable" that it constitutes "cable" service for statutory or regulatory purposes.

[5] In 1983, the Commission authorized ITFS licensees to lease their excess channel capacity to wireless cable operators. Report and Order in Gen. Docket No. 80-112 (Instructional TV Fixed Service), 94 FCC 2d 1203 (1983). Now, more than 90% of recently filed applications contain an excess capacity lease, and the wireless cable lessee almost always pays for the construction of the ITFS facilities. Notice at 1276.

Accordingly, after addressing the proposed ITFS window filing system, we shall address several specific proposals intended to augment the benefits of a window filing system and avoid potential abuse. We seek through these proposals ways either to limit alleged abuses of our filing procedures or to otherwise enhance our processing efficiency to hasten service to the public. Finally, we shall modify the freeze on the filing of major change applications.

## THE WINDOW FILING SYSTEM

4. Background In the Notice we proposed to accept only during limited periods (or "windows") the filing of applications for new facilities, applications for major changes in existing facilities, and major amendments to pending applications.[6] Pursuant to the proposal, the Commission would give Public Notice no fewer than 60 days before opening a filing window, so as to provide adequate time for potential applicants to prepare. We further proposed that the window remain open for a specified number of days. We would place on a proposed grant list applications filed in the window not mutually exclusive with any other application and found to be acceptable; we would place mutually exclusive applications on Public Notice. In each case, we would provide 30 days for the submission of petitions to deny. Single, uncontested applications would then be granted, while winners would be selected from among the mutually exclusive applications pursuant to the existing selection process.[7] Moreover, consistent with our Notice, applications tendered but not yet placed on an "A" cut-off list would be treated as having been filed and cut off as of the close of the first filing window.

5. We tentatively concluded in the Notice that the A/B cut-off system has prevented ITFS and wireless cable systems from reaching their full potential. We observed that recent changes in the service have encouraged a substantial increase in the number of applications submitted. We also noted that the existing system requires duplicative processing of applications, creating an inefficient allocation of scarce Commission resources. The Notice suggested that this double processing contributed to a significant backlog of applications.[8] Greater control over the flow of applications and the elimination of double processing, we stated, would make our analysis of applications substantially more efficient. However, consistent with existing practice, we would make an exception for major changes that would resolve mutually exclusive applications. We would accept applications for such changes at any time, and we would provide a 30-day period for the submission of petitions to deny. We believe that this exception would most efficiently inaugurate new or improved service to the public.

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[6] We would continue to accept at any time the filing of applications for minor changes, as defined by Section 74.911(a) of the Commission's Rules.

[7] With regard to mutually exclusive applications, we would consider only those petitions to deny that were filed against the eventual winner.

[8] Duplicative processing is discussed in further detail in paragraph 10, below.

6. While most commenters agree that the current filing system is inefficient and unnecessary,[9] they are divided on the adoption of a window filing procedure. Supporters of the proposal generally agree that a window filing procedure will help eliminate the inefficiencies resulting from the A/B cut-off system that were discussed in the Notice.[10] Under the A/B cut-off system, educators with wireless cable lessees would at times file applications simply to be mutually exclusive with applicants listed on an "A" cut-off list. The Educational Parties acknowledge that the proposed window filing procedure would eliminate this practice.[11]

7. However, several commenters argue that the adoption of a filing window system without concomitant safeguards against abuse would not increase processing efficiency.[12] According to these parties, a window filing system would encourage some wireless cable entities to persuade educational institutions to submit excessively large and unrealistic numbers of applications, thereby allowing the wireless cable entity to warehouse spectrum. These commenters assert that such wireless cable entities do not intend to construct, but rather seek a profitable bargaining position with allegedly "legitimate" wireless cable developers. They claim that such frequency speculators would file a substantial number of applications for channels throughout the country during the first window, in order to maximize their later bargaining position.

8. The commenters add that a wireless cable operator that plans to construct may not be ready during a filing window to associate with schools and prepare its applications. As a result, they argue, the window would prevent such "legitimate" entities from being able, through their affiliation with educators, to file against the applicant whose lessee does not intend to construct. Alternatively, these parties assert that wireless cable operators that do intend to construct would have to file applications in every market in which they hope

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[9] See, e.g., Paul Jackson Enterprises (Jackson) Comments at 1. See also Notice at 1275-76.

[10] RuralVision South, Inc. and RuralVision Central, Inc. (RuralVision) Comments. American Council on Education, American Association of Community Colleges, Arizona Board of Regents for Benefit of the University of Arizona, Association for Higher Education, California State University - Sacramento, Iowa Public Broadcasting Board, South Carolina Educational Television Commission, State of Wisconsin - Educational Communications Board, St. Louis Regional Educational and Public Television Commission, University of Maine System, University of Wisconsin System, and University System of the Ana G. Mendez Educational Foundation (collectively, Educational Parties) Comments.

[11] Id. at 6-7.

[12] See generally WJB-TV Limited Partnership (WJB-TV) Comments; Jackson Comments; Wireless Cable Association International, Inc. (WCA) Comments; and Educational Parties Comments.

eventually to operate, in order to protect themselves from spectrum speculators.[13] They add that these consequences of a filing window would diminish processing efficiency.

9. The National ITFS Association (NIA) notes the advantages of a window filing system in commercial settings. However, it argues that such a system is inappropriate for educational applicants not associated with a wireless cable lessee, because they require up to 18 months to approve the project and authorize the funds needed for construction. Thus, NIA states that such institutions would not be able to respond in time to a Public Notice of a window, especially during summer vacation. Due to the scarcity of funds, NIA adds, educators would not likely devote funds to planning and constructing an ITFS facility solely on the chance that a window might open at an appropriate time in the future.[14] The Educational Parties similarly maintain that educators that do not rely on excess capacity lessees need more time to approve and fund ITFS facilities. Finally, several parties assert that any window filing procedure must account for the annual January grant application deadline of the National Telecommunications and Information Administration (NTIA).[15]

10. Discussion As discussed in the Notice, the nature of the ITFS service has changed dramatically over the past decade. Using a window filing system, we would be able to control the flow of applications and eliminate the duplicative processing inherent in the existing procedure. We would no longer have to analyze applications solely to place them on an "A" cut-off list, then process them a second time to consider them on their merits. Currently, each application must undergo a substantive engineering analysis upon filing, simply to allow the release of an "A" cut-off list. No applications are granted or denied in this stage of processing. Subsequently, each application undergoes a second technical analysis in order to determine whether it is grantable. Because each of these analyses requires significant resources, the elimination of the duplicative step would substantially improve processing efficiency. Moreover, a window filing procedure would deny frequency speculators with no intention to construct the opportunity to file against applications on an "A" cut-off list. These benefits would significantly improve the Commission's workflow management.

11. In addition, the record reflects that educators would be able to prepare adequately for each subsequent filing period, due especially but not solely to the significant involvement of wireless cable operators in financing and constructing the facilities. Most of these wireless cable operators have substantial experience in filing for Commission licenses. The record reflects no reason why educators without excess capacity leases will not be able to prepare as before for the financing and construction of an ITFS facility. An ongoing series of filing windows will still ensure an opportunity for such educators to file when they are ready.

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[13] Jackson Comments at 2-3; WJB-TV Comments at 11; WCA Comments at 4-6.

[14] NIA Comments at 2-3.

[15] NTIA provides grants to educational institutions for the construction of ITFS facilities.

Indeed, because "A" cut-off lists are not announced in advance or released pursuant to a formal schedule, these educators would be in the same position under the window system as they are now. Consequently, educators that do not rely on excess capacity lessees will not be disadvantaged by the change to a window filing system. For the same reason, the consequences are identical as under the existing system for parties simply not prepared to file during a window.

12. With regard to applicants relying on NTIA funding, we note that NTIA rules require a party seeking a grant to have filed its application with the Commission. Accordingly, in order not to obstruct these grants, we propose allowing each December the tendering of applications that rely upon NTIA funding. We would consider such applications, if filed outside a window period, as having been filed during the immediately following window.

13. Thus, the record in this proceeding suggests that a window filing procedure would increase the efficiency of our processing of applications. Accordingly, we are inclined to adopt it. We also acknowledge the concerns of the commenters that the window filing procedure may not by itself alleviate the problems faced by applicants and the Commission. Specifically, we recognize that it could result in parties' applying for substantially more facilities than they realistically could construct, purposely diverting our resources and delaying the processing of viable applications. Thus, as discussed further below, we seek comment on how we can achieve the significant benefits of a window filing system while minimizing filing practices that impede efficient processing.

## PROPOSALS TO IMPROVE THE APPLICATION PROCESS

14. Financial Qualifications Some commenters advocate requiring applicants or their proposed wireless cable lessees to submit with their applications proof of their financial ability to construct.[16] They claim that such a requirement would deter a significant number of ITFS speculators. Moreover, they propose requiring separate financial documentation for each station applied for, and making the wireless cable lessee submit the documentation when it is paying for construction of the facilities.[17] In this regard, WCA asserts that the Commission requires a similar demonstration of financial viability in other contexts to deter speculation.[18]

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[16] Currently, applicants are required to certify their financial ability.

[17] WJB-TV Comments at 9-10; WCA Reply at 3-4. The Educational Parties would restrict the requirement to applicants with excess capacity leases. Educational Parties Reply at 3.

[18] WCA Reply at 4, n.6, citing e.g., Section 90.496 of the Commission's Rules (requiring applicants for a private paging authorization, in certain circumstances, either to place funds equal to the estimated construction cost in an escrow account, or to obtain a performance bond in the same amount).

15. We request comment on this proposal. We believe that adoption of this proposal may deter a significant number of speculative applications. However, we recognize that adoption of the proposal would entail significant costs. Compiling the necessary documentation could impose a significant burden on educational institutions, especially those not leasing their excess capacity. Further, any enhanced efficiency might be eviscerated by our having to allocate substantial staff resources to the analysis of each financial submission. In addition, the requirement could become a basis for the filing of frivolous petitions, further delaying the grant of applications. We seek comment on how to balance these costs and benefits. Moreover, we note that wireless cable lessees are not parties to ITFS applications. Thus, we ask commenters to address whether it would be appropriate to require lessees to routinely submit demonstrations of their financial ability. Commenters should also address whether our existing rules and policies on misrepresentation sufficiently prohibit parties from falsely certifying their financial ability to construct.

16. Application Caps Next, we turn to two proposals by the Educational Parties to limit the number of certain types of applications that can be filed during a window. First, they propose a cap of three to five applications that an individual nonlocal ITFS entity could file during a window. Such applicants, according to the Educational Parties, often work with frequency speculators and, backed by these wireless cable entities, submit a number of applications simply to bargain with other wireless cable entities seeking to construct a viable wireless cable system.[19]

17. Second, they propose an additional cap of 25 applications associated with the same wireless cable entity, including any entity with direct or indirect common ownership or control. According to the Educational Parties, wireless cable lessees should have to file with their associated ITFS applications information detailing who has any direct or indirect interest in the wireless cable lessee, including any interests as an owner, officer, or director.[20]

18. We invite comments on whether circumstances at this time warrant inquiry into either of the proposed measures. Adoption of either proposal might diminish the number of applications submitted, thereby easing the processing burden substantially. In addition, it would likely limit multiple filings by frequency speculators and their affiliated applicants. However, wireless cable operators require a minimum number of channels with which to operate a viable wireless cable system. Thus, stringent caps could obstruct the rapid development of robust wireless cable systems that can vigorously compete in the rapidly expanding video marketplace. They could also retard the development of ITFS systems, which often obtain funding from the wireless cable lessees. Also, commenters should address

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[19] Educational Parties Comments at 14-15; Educational Parties Reply at 6-7. Citing Section 73.3564(d) of the Commission's Rules, the commenter notes that in low power filing windows, the Commission limits the number of filings by commonly controlled entities.

[20] Educational Parties Reply at 7.

how to justify the proposed discrimination against nonlocal applicants. We note that such entities establish eligibility through letters of intended use from an official of each receive site, and through the service on a local programming committee of an official of each receive site. Thus, we invite commenters to address whether and what kinds of limitations would promote both ITFS and wireless cable development. How can we balance the efficiencies of such limitations with the costs they might impose? If an application ceiling would serve the public interest, how many applications associated with one entity should we allow per window? How would we define common control for the purpose of either ITFS or wireless cable? Should we base our definition on actual control, or on attribution of ownership?

19. Expedited Consideration of Applications The Educational Parties and WCA propose that, under certain circumstances, we give expedited consideration to ITFS applications in return for the applicant's agreeing to an accelerated construction schedule. WCA seeks to prioritize those applications that, if granted, would most likely become part of an operating wireless cable system. It suggests that the wireless cable lessee be able to request and obtain expedited consideration of an application with which it is associated, if the lessee has access to a certain minimum number of channels in the area.[21] In return, grantees would be required to order their equipment within 21 days of Public Notice of the grant. Moreover, the applicant would agree to construct the facilities within six months. Extensions would be granted only under compelling circumstances, such as the inability of the manufacturer to deliver timely ordered equipment, or accidental damages to essential equipment. WCA claims that adoption of the proposal would accelerate the development of both ITFS and wireless cable systems.[22] In addition, the Educational Parties propose that educators without excess capacity leases also have access to such expedited consideration.[23]

20. While we do not now view the implementation of the proposal as practical, we invite comments on the proposal and how it might be implemented. The staff may have to expend substantial resources determining which applications were eligible for expedited consideration, enforcing the requirement for ordering equipment, and enforcing the construction deadline. These activities could significantly slow the rate of processing and ultimately delay service to the public. Also, would the public be served if we denied an extension request when construction is nearly complete at the end of the six months? Finally, the likely substantial number of applicants requesting expedited consideration could defeat the purpose of the proposal. In the alternative, would processing efficiency be adequately improved by a stricter enforcement of the existing requirements for extensions of time?

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[21] WCA proposes expedited consideration only if the wireless cable lessee already has 12 channels, at least 4 of which are MDS. This would include licensed access to MDS or ITFS stations, cut-off non-mutually exclusive proposed MDS facilities, and/or proposed ITFS stations (including the ones at issue). WCA Comments at 7.

[22] Id. at 7-8; WCA Reply at 6-7.

[23] Educational Parties Comments at 5.

21. Assignment of Construction Permits We now turn to a related proposal to diminish the incentive of frequency speculators to submit applications for permits that they intend to later assign for profit. We propose to formalize our current practice of limiting the allowable consideration for unbuilt ITFS facilities to out-of-pocket expenses, as is now applied to the sale of broadcast construction permits. We seek comment on the proposal.

22. Application of the Four-Channel Rule We next address an issue relating to the four-channel limitation rule. Section 74.902(d) of the Commission's Rules generally limits an ITFS licensee to four channels for use in a single area of operation. However, we have not clearly defined what constitutes an "area of operation" for the purpose of the rule. As a result, educational institutions cannot be certain what channels they can apply for. A clear benchmark would make the standard easier for applicants to comply with and would also increase the speed of processing.

23. In this regard, we note that the staff has considered a single area of operation for this purpose to extend no farther than 20 miles from the transmitter site. We seek comment on whether we should adopt that figure as a rule. Commenters should address whether an educational institution is likely to routinely serve an area extending beyond that radius. Alternatively, should we instead define an area of operation in terms of interference, rather than of distance? Specifically, we seek comment on whether we should consider two sites to be in different areas of operation, as long as one could operate at maximum authorized power on the same channel at each site without co-channel interference.

24. Offset We next turn to our policies toward offset.[24] Currently, we apply the 28dB D/U ratio standard to determine co-channel interference. However, we do not require offset if an objection is raised by one of the affected parties. Instead, we have encouraged privately negotiated agreements to use offset to resolve interference.[25] Consequently, we must decide between two mutually exclusive applications when, if the applicants used offset, both could serve the public without objectionable co-channel interference. Unlike broadcast services, ITFS is a direct, point-to-point service that is designed to maximize the number of educational entities that can avail themselves of this service. To require offset between otherwise grantable mutually exclusive ITFS applicants would further this goal. Thus, we propose requiring the use of offset in such circumstances when all affected transmitters are capable of handling frequency offset stability requirements. Such a requirement, we believe, would both accelerate the granting of applications and allow for a greater number of ITFS licensees, thereby increasing service to the public. Also, although we currently require new applicants to use equipment capable of utilizing offset, we have not always done so.

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[24] A licensee utilizing offset operates at a frequency either slightly higher or slightly lower than the standard frequency for that channel. Specifically, such a licensee operates its facilities with a carrier frequency ± 10 kHz from the nominal carrier frequency.

[25] See, e.g., Second Report and Order at 91-92.

Accordingly, we would not apply the proposed rule to facilities predating the requirement that lack offset capability.

25. Protected Service Areas We shall also take the opportunity to refine our rules on protected service areas for the wireless cable lessee.[26] In addition to receive site protection, ITFS applicants can request interference protection for a service area. We provide such protection only at an applicant or licensee's request. Generally, such protection benefits the wireless cable lessee, because the protected service area ensures interference protection within an area where receive sites are not specified, or extended protection over an area where receive sites are not currently located. Moreover, the protection is afforded only during the hours that the wireless cable entity is using the channels.

26. When we adopted the rule authorizing protected service areas, we intended to provide a measure of protection to wireless cable lessees, in order to promote the inauguration of new or improved wireless cable service.[27] However, the protected service area has frequently been used in ways that we had not previously contemplated, which impede new and improved service. Specifically, applicants for new facilities often request and receive interference protection that restricts an existing licensee from seeking certain modifications to its facilities. In addition, otherwise grantable ITFS applications in adjacent communities often obtain interference protection, causing them to become mutually exclusive with a previously filed application. At the same time, an existing facility that has not requested such protection often, upon learning that an application for a nearby operation has been filed, requests interference protection and thereby obstructs the new applicant. We believe that these practices may be an abuse of our processing system driven by certain wireless cable lessees, designed to prevent or dilute competition. Further, this practice significantly impacts our processing and delays the inauguration of new or improved service to the public. Moreover, such practices unfairly disrupt existing operations and already-proposed facilities.

27. We believe that the public interest would not be served if a new applicant's request for a protected service area were made merely to obstruct a pending modification request of a licensed ITFS facility. We also believe that the public is similarly disserved when such protection delays or prevents altogether the authorization of otherwise grantable applications. In order to hasten service to the public, then, we propose to modify our application of interference protection. Specifically, we propose to apply such protection only prospectively. Thus, it would be effective only with regard to applications filed after the protection request. We believe that this would promote the original policies behind interference protection. Commenters are invited to address whether our proposal would sufficiently diminish the disruption and delay resulting from the current method of granting interference protection.

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[26] Sections 74.903(d) and (e) of the Commission's Rules.

[27] Wireless Cable Reconsideration at 6765-67.

28. We also seek comment on a particular application of the proposed rule. Specifically, if two applications submitted during the same filing window, otherwise grantable, are mutually exclusive only because both applicants request a protected service area, we propose to consider them as mutually exclusive. We invite comments on this proposal.

29. Receive-Site Interference Protection Next, we address interference protection for receive sites. Pursuant to Sections 74.903(d) and (e) of the Commission's Rules, an ITFS licensee, permittee, or applicant may request interference protection for its receive sites. Currently, the rule does not expressly limit the distance a receive site may be from the transmitter in order to receive such protection. As a result, we have received numerous applications in which interference protection has been requested for receive sites that appear to be beyond the reasonable coverage ability of an educational institution. We believe that requests for interference protection for receive sites outside the applicant's coverage ability are an abuse of our processes, designed to increase artificially the service area of the wireless cable lessee. We also believe that the elimination of this practice would significantly increase the efficiency of our processing of applications, thereby hastening service to the public.

30. Given an ITFS facility's height, power, frequency, and mode of transmission, our experience suggests that it is generally unlikely that an educational institution would reasonably serve a receive site that is more than 35 miles from the transmitter. Thus, absent a showing of unique circumstances, we propose to provide protection only for those receive sites 35 miles or less from the transmitter. Further, we propose that an applicant not be able to claim eligibility for a license by use of any receive site more than 35 miles from the transmitter. Applicants are invited to address this proposal.

31. Major Modifications We now turn to applications to modify an existing ITFS facility or to amend a pending application. Currently, we classify such applications and amendments as either major or minor, attaching different procedural rules to each.[28] We generally define major modifications as those that significantly impact an existing or proposed facility. Pursuant to the window proposal, the Commission will accept major amendments and applications for major modifications only during an open window period. As we stated in the Notice, we believe that such a rule will enhance processing efficiency.

32. However, the current definition of minor changes, we believe, does not realistically take into account the impact that the proposed change would have on the facility in question, nearby facilities, or proposed facilities.[29] Applicants frequently submit applications for changes that would substantially affect the operations of such facilities, yet we

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[28] Section 74.911 of the Commission's Rules, 47 C.F.R. Sec. 74.911.

[29] Section 74.911 classifies a small number of specified changes as major and defines all other changes as minor.

now treat many of these changes as minor. Accordingly, we propose to reclassify certain changes as major. Consequently, we would accept amendments and applications for such changes only during a window filing period. We believe that this action would more accurately reflect the impact of a proposed change.

33. We have had an informal policy of considering proposals to relocate a facility's transmitter site by 10 miles or more as a major change. We now propose to modify our rules to make this policy formal. In addition, we propose to reclassify as a major change any application or amendment involving: (1) any polarization change; (2) the addition of any receive site that would experience interference from any licensee or applicant on file prior to the submission of the amendment; (3) an increase in the EIRP in any direction by more than 1.5 dB;[30] (4) an increase of 25 feet or more in the transmitting antenna height; or (5) any change that would cause interference to any previously proposed application or existing facility. We note that by limiting the opportunity to file the above types of applications, adoption of the proposal would appear to somewhat diminish a licensee or applicant's flexibility to respond to changing needs and circumstances. At the same time, however, we believe that adoption of the proposed rules would make our classification of changes more consistent. By doing so, we believe, we would enhance the efficiency of the window filing system. Thus, it appears that the benefits gained from the rule would outweigh the costs. We seek comment on our analysis. Finally, we propose to exempt from the new rule any change that resolves mutually exclusive applications without creating new frequency conflicts.[31]

34. FAA Authorization Next, we address the interaction between our rules and those of the Federal Aviation Administration (FAA). Pursuant to Section 17.4 of the Commission's Rules, we do not grant or modify a license until the FAA has determined that the proposed transmitter site will not pose a hazard to air navigation. Under our current rules, applicants state in their applications that they have applied for FAA clearance. However, once that clearance is obtained, applicants are not required to inform the Commission. We seek to hasten the time that our staff learns of the FAA's hazard determinations. Accordingly, we propose to require the applicant to inform the Commission of the FAA's determination. We believe that this proposed change would accelerate service to the public. Commenters are invited to address the costs and benefits of adopting the proposal.

35. Interference Studies We now turn to another matter involving applicants' submissions to the Commission. Applicants often claim that their proposed facilities will cause no harmful interference, based either on their being beyond the radio horizon or on their signal being blocked by nearby terrain. However, such applicants frequently provide no

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[30] Thus, TPO would no longer be the deciding factor in determining whether a change is major.

[31] See paragraph 5. In addition, Section 22.23(g)(2) of the Commission's Rules has a similar exception for the resolution of mutually exclusive applications in the Public Mobile Service.

terrain profiles to support such claims. Furthermore, whenever an applicant files a proposal claiming that no interference will be caused due to the signal's being blocked by the surrounding terrain, a question almost always arises as to the amount of signal that will be blocked. Many applicants conclude that any terrain obstruction, regardless of degree, completely blocks the signal. Our experience has demonstrated that this conclusion is not necessarily true.

36. Accordingly, we propose to amend the rules to require the submission of terrain profiles and a quantitative analysis of any additional signal loss calculated by using the Longley-Rice propagation model, Version 1.2.2, in the point-to-point mode.[32] Adoption of the proposal would make mandatory a technical analysis that many applicants already use. The Longley-Rice model was derived from NBS Technical Note 101[33] and updated in 1982 by G. A. Hufford.[34] Version 1.2.2 incorporated modifications described in a memorandum by Hufford[35] in 1985. Terrain elevations used as input to the model should be from the United States Geological Survey three-second or 30-second digitized terrain databases. Further, we propose to disregard any claim of signal blockage caused by artificial structures. Such claims usually make impossible any quantitative analysis. Accordingly, we seek comment on these proposals.

37. Reasonable Assurance of Receive Sites We have received a number of applications in which some of the schools listed as receive sites have subsequently informed us that they had, in fact, not agreed to participate in the proposed ITFS system. This practice forces the Commission to allocate its scarce resources processing an inaccurate application, then reprocessing it (and related mutually exclusive applications) when the information is corrected. Such duplicative processing significantly delays the final disposition of all ITFS applications.

38. Therefore, we seek comment on how an applicant should demonstrate reasonable assurance of a receive site's legitimacy. We propose requiring a letter of assurance

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[32] Longley, A. G. and P. L. Rice, "Prediction of Tropospheric Radio Transmission Loss Over Irregular Terrain: A Computer Method," ESSA Technical Report ERL 79-ITS 67, Institute for Telecommunications Sciences, July, 1968.

[33] Rice, P. L., A. G. Longley, K. A. Norton, and A. P. Barris, "Transmission Loss Predictions for Tropospheric Communications Circuits," NBS Technical Note 101 (Revised), vol. I-II, U.S. Department of Commerce, 1967.

[34] Hufford, G. A., A. G. Longley, and W. A. Kissick, "A Guide to the Use of the ITS Irregular Terrain Model in the Area Prediction Mode," NTIA Report 82-100, U.S. Department of Commerce, April, 1982.

[35] Hufford, G. A., Memorandum to Users of the ITS Irregular Terrain Model, Institute for Telecommunications Sciences, U.S. Department of Commerce, January 30, 1985.

from the applicant, listing the receive sites' contact people, titles, and telephone numbers. With regard to noncompliance with any new requirement, should we automatically decline to consider any proposed receive site without adequate assurance?

39. Accreditation of Applicants We now turn to the accreditation of ITFS applicants. Currently, pursuant to Section 74.932 of the Commission's Rules, an applicant to construct new facilities must report whether it, its members, or the receive sites it serves are accredited.[36] The application form does not require the educator to specify whether it is the applicant or its members that are accredited. This ambiguity has opened the door to abuse of our procedures. Consequently, we have received applications in which the applicant is an accredited organization, but it proposes receive sites at non-accredited institutions. Applicants often evade the intent of the rule by having only one receive site out of many accredited, thereby defeating the fundamental purpose of the service, which is to serve the educational needs of accredited institutions.

40. Accordingly, we seek comment on how we can curb this abuse of the service. We propose to require applicants to state whether and by whom each school listed as a receive site is accredited. We also propose not to consider in a tie-breaking proceeding a receive site that lacks this accompanying information, or that is unaccredited, as that would allow it unwarranted comparative consideration. Commenters are invited to address other ways we should utilize the additional information. Should we require a majority of receive sites to be accredited in order for the application to be grantable? Should we deny interference protection for any unaccredited receive site?

41. We invite commenters to address any or all of the above proposals. However, we do not wish to limit the range of comments in this area. Thus, we welcome other proposals besides those discussed above that would safeguard both the efficiency of a window filing system and the integrity of our processes.

## FREEZE ON NEW APPLICATIONS

42. In the Notice we announced that, for a period of time, we would not accept applications for new ITFS facilities or for major changes to existing facilities. We expressed our concern that potential applicants, in order to apply for a license or a major change before the possible adoption of a filing window rule, would inundate the Commission with applications while the "A" and "B" cut-off rule was still in effect, thereby defeating the purpose of the proposed rulemaking. However, we stated that we would continue to accept (but not process) applications in which the applicant relies on NTIA for construction funds. We have also continued to accept major change proposals where they are filed in the same market to accommodate settlement agreements among applicants that have previously achieved cut-off status and where the settlement resolves mutually exclusive applications.

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[36] Form 330, Section II, Question 3.

43. We believe that the public interest would be served by a modification of the freeze. Specifically, upon publication of this Order and Further Notice in the Federal Register, we shall instruct the staff to begin accepting applications for major changes to existing facilities, and any mutually exclusive applications thereto. Such applications will be processed under the existing A/B cut-off rules. We believe that this will ease the burden that the freeze has caused to educational institutions that seek to alter their existing facilities. Licensees and those filing competing applications may file such applications until the effective date of any window filing rules.[37] We note that this Order and Further Notice contemplates modifying our definition of a major change. For the purposes of modifying the freeze, we shall use the existing definition of the term. Any pending major modification application not cut off as of the adoption date of this Order and Further Notice will be considered in conjunction with the newly submitted applications.

## ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analyses

44. The Commission's initial regulatory analysis for this Order and Further Notice of Proposed Rulemaking is set forth in Appendix B.

B. Ordering Clauses

45. IT IS ORDERED that this Order and Further Notice of Proposed Rulemaking IS ADOPTED.

46. IT IS FURTHER ORDERED that, upon publication of this Order and Further Notice of Proposed Rulemaking in the Federal Register,[38] applications for major changes to existing ITFS facilities will be accepted for filing by the Federal Communications Commission. Such applications will be processed pursuant to existing rules.

47. IT IS FURTHER ORDERED, that the petition to modify the freeze submitted by American Telecasting, Inc. IS DISMISSED AS MOOT.

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[37] American Telecasting, Inc. (ATI), a wireless cable entity, has submitted a petition to modify the freeze. Our decision here modifies the freeze on a broader scale than requested by ATI. Therefore, we dismiss ATI's petition as moot.

[38] Because the partial lifting of the freeze grants an exemption and relieves a restriction, the 30-day Federal Register publication requirement does not apply. See 5 U.S.C. Sec. 553(d)(1).

C. Additional Information

48. For additional information on this proceeding, contact Paul R. Gordon, Mass Media Bureau, (202) 418-1630.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

## APPENDIX A

### A. List of Commenters

**COMMENTS**

American Council on Education, American Association of Community Colleges, Arizona Board of Regents for Benefit of the University of Arizona, Association for Higher Education, California State University - Sacramento, Iowa Public Broadcasting Board, South Carolina Educational Television Commission, State of Wisconsin - Educational Communications Board, St. Louis Regional Educational and Public Television Commission, University of Maine System, University of Wisconsin System, and University System of the Ana G. Mendez Educational Foundation
Paul Jackson Enterprises
National ITFS Association
RuralVision South, Inc. and RuralVision Central, Inc.
Wireless Cable Association International, Inc.
WJB-TV Limited Partnership

**REPLY COMMENTS**

American Council on Education, American Association of Community Colleges, Arizona Board of Regents for Benefit of the University of Arizona, Association for Higher Education, California State University - Sacramento, Iowa Public Broadcasting Board, South Carolina Educational Television Commission, State of Wisconsin - Educational Communications Board, St. Louis Regional Educational and Public Television Commission, University of Maine System, University of Wisconsin System, and University System of the Ana G. Mendez Educational Foundation
Wireless Cable Association International, Inc.

### B. Ex Parte

This is a nonrestricted notice and comment rulemaking proceeding. Ex Parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. See generally, 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

### C. Comment Dates

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before

**August 29, 1994**, and reply comments on or before **September 28, 1994**. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, room 239, at the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

## APPENDIX B

**Initial Regulatory Flexibility Analysis**

Reason for the Action: This proceeding was initiated to review and update the procedures which govern the filing of applications for new ITFS channels.

Objective of this Action: The actions proposed in this Further Notice are intended to improve ITFS and wireless cable service by making the regulations that govern applying for a new ITFS channel consistent with the continuing evolution of the telecommunications industry.

Legal Basis: Authority for the actions proposed in this Further Notice may be found in Sections 1, 4(i) and (j), 303, 308, 309, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 303, 308, 309, and 403.

Number and Type of Small Entities Affected by the Proposed Rule: Approximately 1,200 existing and potential wireless cable and ITFS operators, the majority of which are small, would be affected by the proposals contained in this Further Notice.

Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule: The proposals suggested in this Further Notice are designed to prevent abuses of our filing system. Adoption of the proposals would impose little to no regulatory burden on most educational institutions.

Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule: None.

Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action: The proposals contained in this Further Notice are meant to make the regulations that govern applying for a new ITFS channel consistent with the continuing evolution of the telecommunications industry.

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposal suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as

comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq., (1981)).